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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

16 | TARI LABS, LLC.

Plaintiff,

V.

19 || LIGHTNING LABS, INC.

Defendant.

Case No. 3:22-cv-07789-WHO

**PLAINTIFF'S REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNC-
TION**

Date: March 8, 2023
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Courtroom: Via Zoom Videoconference

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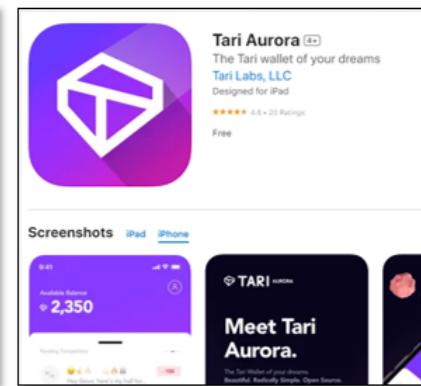
1 Plaintiff Tari Labs, LLC (“Tari Labs”) respectfully submits this Reply in further support of
 2 its Motion for Preliminary Injunction (ECF ____). Defendant’s Opposition essentially admits that
 3 its TARO protocol was pending imminent release and commercialization, and presents almost no
 4 evidence to address the obvious and substantial harm Tari presented in the Motion. The Opposition
 5 instead paints a glossy picture of a world where TARO is not “consumer-facing”, where blockchain
 6 and NFT users engage with only one protocol, and where people typing on keyboards and looking
 7 at brand names could not be confused by TARI® and TARO. This picture is make-believe and
 8 contradicted by innumerable public-facing TARO statements and advertisements, not to mention
 9 decades of caselaw precluding trademarks in similar classes of products.

10 The Opposition hinges most of its defense on the false idea that, despite all its public-facing
 11 blogs, Youtube videos, website posts and advertisements, “TARO” will never be seen by
 12 consumers (Opp. at 1). But just yesterday, Tari discovered that, in addition to the new contemplated
 13 release of TARO, its development partners and users also are intending to launch an infringing “TARO
 14 Web Wallet” that will compete directly with the existing TARI® Aurora Wallet on Apple’s App
 15 Store (Jain Rep. Decl. 17.):

16 INFRINGING “TARO” WALLET



16 “TARI” AURORA WALLET



17 The TARO WEB WALLET is precisely the kind of product which Tari anticipated in its
 18 opening brief (Mot. at 12-15), and which Defendant barely addresses. The Opposition also fails to
 19 seriously dispute that both TARI® and TARO are blockchain-related protocols for digital assets; that
 20 they market to the same consumer and developer base using the same marketing channels like the
 21 Apple Store, GitHub, and social media; that they are covered by the same industry publications; that
 22 they are featured at the same industry conferences; and that they share common venture investors. Only

1 TARO®, however, has a federally-registered trademark long preceding the other in commerce. If the
 2 TARO protocol is allowed to further develop and launched, consumer-facing TARO apps will
 3 multiply and sow precisely the confusion that our trademarks laws were designed to prevent.

4 The requested [Proposed] Preliminary Injunction (ECF ____) will help protect TARI® and
 5 the general public during the pendency of this case and impose little burden on Defendant who, if it
 6 elects, could easily adopt a better name in far less time than it took to draft its opposition brief.

7 **ARGUMENT**

8 **I. TARI'S REQUESTED RELIEF WILL PREVENT IRREPARABLE HARM**

9 Defendant's opposition spends little time addressing the evidence of harm Tari presented in
 10 its opening papers, including the five vignettes described by Tari's CEO Naveen Jain where
 11 consumers will inevitably interact with the two protocols, often mistaking them for one another,
 12 resulting in broken transactions, lost digital assets and a deeply unsatisfactory user experience.
 13 (Mot. at 12-15.) Defendant do not even contest that irreparable harm is presumed from trademark
 14 infringement under the Lanham Act, 15 U.S.C. § 1116(a). Instead, the Opposition relies on bald
 15 assertions that the harms evidenced by Tari are merely "speculative," which is contradicted by the
 16 substantive evidence set forth in Tari's declarations, expert reports and related case law examples
 17 (Opp. at 1.)

18 Defendant also focuses on a single piece of evidence to dispute irreparable harm, arguing
 19 that Tari's practical marketplace scenarios where confusion will occur (Mot. at 12-15) are
 20 unrealistic because "Lightning Labs does not intend to ever offer NFTs, ***digital wallets***, or any
 21 other products for end-consumers under the TARO mark." (Opp. at 23.) But Defendant fails to
 22 inform the Court, as shown in the introduction above, that ***there is already a consumer-facing***
 23 ***Taro Digital Wallet application in the marketplace.*** (Jain Decl. Ex. 13; see
 24 <https://testnet.tarowallet.net/walletapp/>.)

25 This evidence alone proves precisely the kind of viral harm which Tari is concerned about.
 26 Defendant's protocol project admittedly is based on encouraging developers to develop consumer-
 27 facing applications using the "TARO" mark once its protocol is launched at scale. As Defendant
 28 states: "many external developers have already begun building on TARO under that name." (Opp.

1 at 23.) Because Defendant is admittedly aware that developers are creating consumer-facing
 2 applications using the “TARO” name, its repeated protestations throughout its brief to the contrary
 3 are hollow and are misleading. That the marketplace scenarios identified by Tari are already being
 4 borne out even before Defendant’s formal launch is strong evidence that mass confusion and
 5 irreparable harm will continue to occur if Defendant’s infringement is not enjoined – with
 6 existential stakes for Tari.

7 Defendant otherwise fails to meaningfully rebut that potential customers are likely to
 8 become confused while creating NFTs, browsing digital assets, selecting a TARI®-compatible
 9 wallet, creating smart contracts, or selecting development tools. (Jain Decl. ¶ 42; Palmatier Expert
 10 Decl. ¶ 91.) Such users are likely to conclude that Tari’s technology did not work as intended and
 11 blame Tari for their negative experiences. (*Id.*) Likewise, developers concerned about end-user
 12 confusion are likely to avoid incorporating Tari’s technology. (Jain Decl. ¶ 43; Palmatier Expert
 13 Decl. ¶ 95.) Such harm to reputation and goodwill is a classic example of irreparable harm, as
 14 demonstrated by authority that Defendant does not address or distinguish. *FAZE Apparel, LLC v.*
 15 *Faze Clan, Inc.*, No. 218CV02052RGKJEM, 2018 WL 3830027, at *7 (C.D. Cal. May 22, 2018)
 16 (“[e]vidence of loss of control over business reputation and damage to goodwill can constitute
 17 evidence of a likelihood of irreparable harm”).

18 Defendant also does not meaningfully address the affect that infringement will have on
 19 reducing Tari’s business opportunities – damages that would be almost impossible to establish
 20 before a jury with he kind of certainty required under federal law.

21 Defendant next argues that initial interest confusion between TARO and TARI® is not
 22 “taken seriously,” Opp. at 35, but the Ninth Circuit disagrees. The threat of initial interest
 23 confusion has been upheld throughout district courts in California, and by the Ninth Circuit itself as
 24 sufficient justification to warrant preliminary injunctive relief. See *Brookfield Communications,*
 25 *Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1063–64 (9th Cir. 1999) (reversing with
 26 instructions to enter preliminary injunction based in part on “initial interest” confusion). Because
 27 of the near-exact similarity between TARI® and TARO – including their proximity on the
 28 keyboard – potential customers are likely to experience “initial interest” confusion and investigate

1 Defendant's infringing protocol instead of Tari's. (Palmatier Expert Decl. ¶ 92.)

2 The Opposition also fails to address or distinguish Tari's authority that the intended
 3 infringement will cause reverse confusion and swamp TARI® in the marketplace, thereby
 4 undermining its efforts to create broad goodwill in TARI® products and services. (See Jain Decl. ¶
 5 45; Palmatier Expert Decl. ¶ 98-100.) Defendant ignores the authority cited by Tari showing that
 6 such harm is not only irreparable but existential: "The result of reverse confusion 'is that the senior
 7 user loses the value of the trademark—its product identity, corporate identity, control over its
 8 goodwill and reputation, and ability to move into new markets'" *Ironhawk Techs., Inc. v. Dropbox,*
 9 *Inc.*, 2 F.4th 1150 at 1160.

10 Finally, Defendant argues, without evidence, that any potential confusion would be limited
 11 and of very little consequence to either business (Opp. at 22-23). In fact, there is a substantial,
 12 almost geometric, "network effect" created by the kind of infringement envisioned by Defendant.
 13 Each user who is confused or misled by Defendant's infringing protocol not only represents a lost
 14 business opportunity, but also reduces the value of the TARI® protocol for other users by reducing
 15 the "network effect" that each user enjoys. (Jain. Dec. ¶ 30.) This threatens to create a downward
 16 spiral similar to a "run on the bank," preventing TARI® ever from achieving its potential. (*Id.*)

17 **II. TARI ACTED TIMELY AND TOOK REASONABLE STEPS TO AVOID THE
 NEED FOR THIS MOTION**

18 Tari filed suit promptly after investigating its claims and attempting to resolve the dispute
 19 prior to Defendant's launch announcement. *See Warner Bros. Ent. v. Glob. Asylum, Inc.*, 2012 WL
 20 6951315, at *21 (C.D. Cal. Dec. 10, 2012), *aff'd*, 544 F. App'x 683 (9th Cir. 2013). Defendant's
 21 response—that Tari sat on its rights since April, 2022—is undermined by its own evidence, and
 22 further proves that Tari has been diligent in protecting its rights.

23 Defendant points to a direct message exchange from April 2022 between Tari's CEO,
 24 Naveen Jain, and Defendant's CEO, Elizabeth Starke (Dkt. No. 30), as purported evidence of
 25 Tari's awareness of TARO. Defendant neglects to mention, however, that this message exchange
 26 was only the first in a series of attempts to dissuade Defendant from using the infringing TARO
 27 name. (Supplemental Declaration of Tari's CEO, Naveen Jain ("Jain Supp.") ¶¶ 5-9.) Tari first
 28

1 reached out in April 2022 while the Parties were attending Crypto Bahamas. (*Id.* ¶ 5.). The message
 2 exchange was followed up by a face-to-face meeting in the Bahamas, where Stark misled Mr. Jain
 3 by telling him that TARO would not be public-facing. (*Id.* ¶ 6.), when, as demonstrated by Tari, the
 4 soon-to-be-launched TARO protocol has proven to be incredibly public-facing. (*Id.* ¶ 14-16.). In
 5 June 2022, Tari tried again. (Jain Supp. Exh. 1). Because the Parties were friends and socialized
 6 and attended business meetings together, Tari attempted to resolve the dispute amicably. (Jain
 7 Supp. ¶ 3). “[L]ooking for the smoothest path to resolve this,” another Tari principle, and friend of
 8 Starke, wrote. (Jain Supp. Exh. 1). Tari offered to help TARO “brainstorm a new name,” come up
 9 “with some logo concepts,” and “frame the announcement of the name change so that it is a
 10 positive, joyous thing.” (*Id.*) Tari also extended use of its “excellent team of designers.” (*Id.*) Tari
 11 shared a screenshot of actual confusion that occurred in its Tari Telegram Channel. (*Id.*) A user
 12 posted “wtf” alongside a TARO article. (*Id.*) Tari indicated that it had spoken with its GC and
 13 outside legal counsel and intended to defend its trademark. Stark ignored these messages and a
 14 follow-up.¹ (*Id.*)

15 Frustrated in its efforts, on September 12, Tari sent a cease-and-desist letter warning
 16 Defendant against using the infringing TARO mark. (Hagey Decl. ¶ 2 Ex. 1.) Tari received a
 17 response from Defendant’s counsel at Wilson Sonsini again mischaracterizing the scope of the
 18 TARO Project and rejecting Tari’s request on September 27, 2022. (*Id.* ¶ 3 Ex. 2.) As discussed in
 19 Tari’s Motion, the response letter also provided a vivid illustration of confusion by mixing up
 20 TARI® and TARO in the body of the letter itself. (*Id.*) The next day, Defendant launched the alpha
 21 version of TARO. Since filing suit on December 8, 2022 and prior to filing this motion, Tari has
 22 twice requested that Defendant voluntarily cease its infringement, both times in response to defense
 23 counsel’s requests for extensions of time to respond to the complaint in December and January.
 24 (*Id.* ¶ Ex. 3 and Ex. 4.)

25 Defendants’ argument that Tari unduly delayed rings hollow because the delay was caused
 26

27 ¹ TARO’s claim that “there is no evidence that it was doing anything to ‘persuade’ Lightning Labs”
 28 from infringing (Dkt. No. 35 at 26), and that Tari “made no serious effort to contact Lightning Labs
 about its plans until September 2022” (*id.*) — is patently false.

1 in large part by Defendants' deceit. When a defendant delays preliminary relief by means of
 2 misdirection or withholding information, however, the alleged delay is not attributable to plaintiff,
 3 but to defendant. *Cf., Guess?, Inc. v. Tres Hermanos*, 993 F. Supp. 1277, 1286 (C.D. Cal. 1997)
 4 (granting motion for preliminary injunction filed 11 months after initial cease and desist where
 5 defense' counsel induced plaintiffs to believe that defendants "intended to resolve the problems
 6 between their respective clients").² Defendants' deceit in the face of being notified of their
 7 infringement additionally constitutes willful infringement. *See Ironhawk Techs., Inc. v. Dropbox,*
 8 *Inc.*, 2 F.4th 1150, 1167 ("Use of an infringing mark, in the face of warnings about potential
 9 infringement, is strong evidence of willful infringement").

10 In such circumstances, Tari acted prudently and carefully to avoid the necessity of this
 11 motion against a much larger, more highly funded competitor. And, for its part, Defendant should
 12 not be entitled to rely on its own false assurances and misleading statements about TARO's
 13 supposed "non-public facing" in order to deny Tari's requested equitable relief.

14 **III. AN INJUNCTION POSES LITTLE TO NO BURDEN ON DEFENDANT AND WILL
 15 PROTECT INNOCENT USERS**

16 Defendant fails to articulate any meaningful hardship it would face in changing its name.
 17 Unlike TARI®, the name Taro is not integral to Defendant's brand. Its affinity for the root
 18 vegetable of the same name does not justify infringement, no matter how clever Defendant believes
 19 the name to be. Moreover, Defendant's venture into digital assets is not a service that is core to its
 20 business. Defendant could change its name with little to no cost and no more than a couple of hours
 21 of its time. (Berry Decl. ¶ 7-9.) This is evidenced by Defendant's own inaction on the name Taro.

22 ² Defendant's cases, (Dkt No. 35 at 26), are nothing like the present case, where Defendant has
 23 misled Plaintiff, and misrepresented its infringement in the face of Plaintiff's good faith efforts to-
 24 wards resolution. *See Rovio Ent. Ltd. v. Royal Plush Toys, Inc.*, 907 F. Supp. 2d 1086, 1097 (N.D.
 25 Cal. 2012) (finding that "evidentiary shortcomings," failure to meet the legal standard, and an un-
 26 timely filing counseled against injunctive relief); Perez v. City of Petaluma, 21-CV-6190, 2021 WL
 27 3934327, at *1 (N.D. Cal. Aug. 13, 2021) (finding that Plaintiff failed to address or even explain
 28 delay in denying ex parte TRO but setting hearing on preliminary injunction); Coop. Regions of
 Organic Producer Pools v. Stueve's Certified Organic Dairy, 14-CV-1123, 2014 WL 12571393, at
 *2 (E.D. Cal. July 25, 2014) (denying ex parte TRO because Plaintiff failed to explain why it did
 not seek injunctive relief earlier); Khadavi v. Stagi, Inc., 20-CV-7948, 2021 WL 4057526, at *3
 (C.D. Cal. Apr. 8, 2021) (same).

1 Defendant protests that it would somehow be harmful or burdensome to comply with an
 2 injunction, Opp. at 23, but in reality it would be trivially easy for Defendant to change its name to
 3 another root vegetable, say Beetroot, for example. (*Id.*) All that would be required would be the
 4 following three simple steps: (i) rename TARO to BEETROOT for the repository folder name on
 5 Defendant’s GitHub page and all folder and subfolders with the name TARO within that repository
 6 folder; (ii) run a “search and replace” command within the code itself; and (iii) issue a press
 7 release and contacting appropriate industry media outlets, such as CoinDesk and BitCoin
 8 Magazine.. (*Id.*) Changing file names could be completed in minutes, and checking that the
 9 changes were complete and accurate would take less than an hour. (*Id.*)

10 Public interest also favors an injunction to stop confusion before it occurs. (Jain Decl. ¶ 40)
 11 The blockchain industry has been roiled by recent negative press and is under pressure to weed out
 12 bad actors and malfeasance. Preventing further consumer losses and confusion clearly serves the
 13 public interest. Defendant’s launch will engender further potential frustration amongst an innocent
 14 public and should be enjoined if for no other reason than this.

15 **IV. TARI IS LIKELY TO SUCCEED ON THE MERITS**

16 **A. TARI® is Strong**

17 In determining the strength of the mark, courts consider both a mark’s conceptual strength
 18 and its commercial strength. *See JL Beverage Co., LLC v. Jim Beam Brands Co.*, 828 F.3d 1098,
 19 1106-09 (9th Cir. 2016). Defendant concedes that TARI® occupies the highest category of
 20 conceptual strength as an “arbitrary” mark (Opp at 9 n. 3), and instead disputes only commercial
 21 strength. (Dkt. No. 35 at 13.)

22 Defendant’s commercial strength argument miss the mark: where the trademark plaintiff
 23 has alleged reverse confusion, like here, courts are required to consider not only the senior user’s
 24 commercial strength, but also that of the *junior user*’s mark – i.e., TARO. As the Ninth Circuit has
 25 noted, in situations of reverse confusion, “a plaintiff with a commercially weak mark is more likely
 26 to prevail than a plaintiff with a stronger mark.” *Ironhawk Techs., Inc. v. Dropbox, Inc.*, 2 F.4th
 27 1150, 1163 (9th Cir. 2021) (quoting *Cohn v. Petsmart Inc.*, 281 F.3d 837 (9th Cir. 2002) (per
 28 curiam)). Thus, even if Defendant were correct with respect to commercial strength, that would

1 help, rather than hurt, Tari's likelihood of success on its infringement claims with respect to reverse
 2 confusion.

3 In any event, Tari's mark is commercially strong, as demonstrated in Mr. Jain's original
 4 declaration. (Jain Dec. ¶ 10, Exhs. 1, 2); *see also id.* at ¶ 11. There have been over 1,000
 5 downloads of the TARI Aurora Wallet from the Google Play Store, over 2,000 members on each of
 6 Tari's site on the apps Discord and Telegram, and nearly 8,000 followers on @Tari's Twitter
 7 account. (Jain Supp. Exh. 2). . Where, as here, Tari is a young company at a relatively early stage
 8 of development, this level of commercial activity more than satisfies the use requirements for the
 9 Lanham Act, since otherwise a better funded junior user like Defendant could snuff out the senior
 10 user's inherently distinctive mark before the senior user gets a chance to market it. See *M2*
 11 *Software, Inc., v. Madacy Entertainment*, 421 F.3d 1073, 1081 (9th Cir. 2005) *cert. denied*, 126
 12 S.Ct. 1772 (U.S. 2006). .This factor favors grant of the injunction.³.

13 B. Defendant's TARO Product is Consumer-Facing

14 Defendant insists throughout its Opposition that TARO will not be consumer-facing.
 15 However, these claims are contradicted by its consumer-facing statements, tweets, interviews,
 16 podcast features, and YouTube videos, each of which can found in Mr. Jain's original declaration,
 17 including (1) statements by Defendant's CEO Elizabeth Stark regarding ideal TARO customers,
 18 and that TARO will be used to create NFTs and other digital assets, (2) statements by Ms. Stark,
 19 Defendant's CTO, and Defendant's Technical Contact Lead, that TARO will be used to create ,
 20 buy and sell NFTs and other digital assets, included tokenized baseball cards and digital in-game
 21 items, (3) a statement by Defendant's content lead that "The biggest hurdle for the Lightning
 22 Network at this moment is "finding people that are willing to sell products over the Lightning
 23 Network, and others who want to buy things with it," and (4) statements by Defendant's CTO

24 ³ Defendants' speculation in footnote 2 of its brief that the assignment of the TARI® application
 25 from AccessCoin, LLC to Tari LLC was somehow deficient is without merit. The Lanham Act
 26 permits assignment of intent-to-use applications "for an assignment to a successor to the business
 27 of the applicant, or portion thereof, to which the mark pertains, if that business is ongoing and ex-
 28 isting." 15 U.S.C. §1060(a)(1). That is what happened here: AccessCoin LLC assigned its proto-
 col business, including trademarks, to Tari, its subsidiary. See Jain Supp. Decl. ¶ 18. Even a cur-
 sory look at public records show that the entities are registered to the same address, and that Ac-
 cessCoin, LLC is a manager of Tari. *Id.* and Ex. 3.

1 illustrating an example of TARO usage by positing individuals engaged in an exchange of a
 2 stablecoin worth \$10. (Jain Decl. ¶12, 13, 20 and 22 and Jain Supp. Decl. at ¶ 14),
 3 These statements demonstrate conclusively that Defendants' TARO protocol will be used by
 4 everyday consumers for a wide range of digital assets. .Moreover, these consumers will be *required*
 5 to know the difference between TARI and TARO if they want to store, purchase and sell their
 6 digital assets: otherwise their transactions will fail.

7 **C. The Parties' Markets Are the Same and Overlap in Numerous Ways**

8 Defendant's arguments with respect to marketplace proximity are an exercise in hair-
 9 splitting, claiming that TARI® and TARO are somehow unrelated despite the fact that both are
 10 blockchain protocols for issuing and transferring digital assets. (Opp. at 9-12.) As shown below, it
 11 is obvious that end users will be confused based on the current state of the market.

12 **1. TARO Wallet v. TARI® Wallet**

13 TARO is very public-facing, very confusing, and very-imminent. Despite Defendant's
 14 claim that a wallet developer would use the name of the blockchain rather than the name of its
 15 protocol, a new wallet developer shows otherwise. The TARO wallet is a “[c]ryptocurrency wallet
 16 for the Taro protocol. Trade, exchange and mint altcoins and NFTs directly on Bitcoin blockchain.”
 17 (Jain Supp. Exh. 13). The TARO wallet will compete directly against the TARI® wallet for
 18 consumers. (Jain Supp., ¶ 32.). And end users will need to know whether they are purchasing a
 19 “TARO asset,” or a “TARI® Asset,” as denominated in articles already. (Jain Supp., ¶ 30.)
 20 (“Transferring a Taro Asset”). Likewise, invoices for digital assets will specify whether it is a
 21 TARO asset or a TARI® asset. (Jain Dec. Exh. 20).

22 **2. Defendant's Purported Distinctions Between TARO and TARI® are
 Distinctions Without a Difference**

23 First, Defendant attempts to create a binary world of Bitcoin and Monero enthusiasts is
 24 divorced from reality and fundamentally misunderstands Tari, Tari's trademark, and Tari's
 25 trademark rights. (Opp. at 9-12, 17.) Neither crypto enthusiasts nor developers are siloed to one
 26 blockchain as Defendant suggests, and neither is Tari. While Tari currently leverages Monero as a
 27 foundational security level, Taro can operate independently of Monero. (Declaration of Michael
 28

1 Berry (“Berry Decl.” ¶¶10-16.) This is It can also be made interoperable with other blockchains.
 2 Moreover, Tari’s trademark is for “cryptocurrency trading and exchange services,” and is silent as
 3 to which blockchain these services are tied. In 2018, well before TARO’s inception, Tari
 4 announced plans to build “a standards compliant [] router,” that would make “compatible []
 5 Bitcoin, Monero, and Tari.” (Jain Supp., ¶ 4.). Any efforts by Defendant to force Tari into one
 6 corner of cryptocurrency trading and exchange services, and foreclose its natural expansion into
 7 other blockchains, should be rejected.

8 Second, consumers, developers, and creators are not beholden to just one blockchain. This
 9 is obvious and Defendant knows it. Defendant’s CTO admitted this at the Starkware Sessions 2023
 10 conference in Tel Aviv. (Jain Supp. Exh. 6). Starkware is a software company that works on the
 11 Ethereum blockchain, and Starkware Sessions 2023 is an event to “bring together the Ethereum
 12 community for a two-day event of talks, panels, workshops, round tables, show casing and more.”
 13 (Jain Supp. Exh. 6). TARO is not on Ethereum, but Mr. Osuntokun showed how STARKs “can be
 14 introduced into the Bitcoin development ecosystem.” (Id.) (cleaned up).

15 And whether Defendant’s protocol is on Bitcoin and Tari’s protocol is on Monero does not
 16 matter. Many wallets support both Bitcoin and Monero, such as Edge and Exodus And most
 17 consumers simply do not care. If consumers wish to buy “a tokenized rare baseball card, for
 18 example” they will do so, regardless of the blockchain on which the asset resides.⁴ (Jain Supp., ¶
 19 18.).

20 **3. Tari’s Examples of Confusion Show Real-World Inevitabilities**

21 Defendants attempts to undercut Plaintiff’s examples of confusion by arguing that sites like
 22 OpenSea and OpenZeppelin do not currently support Bitcoin, and that the examples reference and
 23 list blockchains, not protocols, are easily disposed of.

24
 25
 26 ⁴ Defendant’s citation to *PerkinElmer Health Scis., Inc. v. Atlas Database Software Corp.*, No.
 27 92046554, 2011 WL 7005538, at *14 (T.T.A.B. Dec. 22, 2011) (Dkt No. 35 at 14) is distinguishable as in that case the consumers involved were sophisticated public health departments, not potential
 28 purchaser of tokenized rare baseball cards.

1 It is not surprising that OpenSea and OpenZeppelin⁵ do not currently support Bitcoin. Until
 2 the recent upgrade to Bitcoin, the Taproot Asset Representation Overlay that enabled TARO, the
 3 creation of digital assets on Bitcoin was not feasible. (Jain Supp. ¶ 18.). With this new
 4 functionality, however, it is likely that current NFT marketplaces like OpenSea, and coding
 5 wizards, like OpenZeppelin, will expand to support other blockchains and protocols, or new
 6 marketplaces and wizards will emerge to meet demand. (Jain Supp. ¶ 18.). (Jain Dec. Exhs. 28-29,
 7 31.)

8 The digital assets ecosystem is evolving, and Defendant's attempts to impose rigid lines
 9 where few fit is misplaced. For example, Polygon, which OpenSea and the Coinbase Wallet
 10 support is a Layer 2 protocol built on the Ethereum blockchain. (*See* Jain Dec. Exhs. 28-30). Like
 11 TARI, it also functions as its own blockchain.

12 **4. Illustration of Public Facing Protocols Like TARO: Ordinals**

13 Despite Defendant's claims to the contrary, expansion into other blockchains is a common
 14 enough trajectory for blockchain products and services, and especially where related to digital
 15 assets. (Jain Supp., ¶ Ordinals, another digital assets protocol (similar to TARI® and TARO),
 16 provides a clear example of TARO's very-public-and-confusing trajectory if it's permitted to
 17 launch under its infringing name.

18 The world's leading NFT creator, Yuga Labs, recently announced that it was expanding
 19 from Ethereum, another blockchain, to the Bitcoin blockchain. (Jain Supp., ¶ 24.). In doing so, it
 20 is using the newly launched digital assets focused protocol, Ordinals, and will auction off NFTs.
 21 (Jain Supp., ¶ 25.). Ordinals and Yuga Labs recommend that potential buyers of its digital assets set
 22 up an Ordinals wallet in anticipation of the auction. (Jain Supp., ¶ 26). Although the Ordinals
 23 protocol just launched on January 21st, wallet developers have risen to the occasion. On February
 24 15 Xverse Wallet announced that it had "launched 1st class support for ordinals"; on February 16
 25 an unaffiliated "Ordinals Wallet" launched; and Hiro Wallet released that it would "roll out

26
 27 ⁵ Defendant also argues that OpenZeppelin is specific to sophisticated developers. This is false,
 28 hence OpenZeppelin's entire learning library for those that are "new to smart contract development," <https://docs.openzeppelin.com/contracts/2.x/>, providing "[c]omprehensive guides for every step of your development journey," <https://docs.openzeppelin.com/learn/>.

1 expansive support for both Stacks-based NFTs and Ordinal inscriptions.” (Jain Supp., ¶ ____).
 2 Because the Ordinals protocol code is open-source, developers will build on top of it and market
 3 that their respective Ordinal wallets and applications and will denominate assets like NFTs made
 4 with the Ordinals protocol as Ordinals assets. Likewise, platforms like OpenSea will need to
 5 disclose whether they sell TARI® and/or TARO assets to consumers.

6 This will be the case with TARO once it launches. Whether these developers choose to list
 7 TARI® and/or TARO under Chains, Network, by logo, or by name, will ultimately be up to the
 8 developers, and under a free open-source code, it is less about precise nomenclature (which is
 9 increasingly becoming ambiguous with the advent of app chains, second layers, sidechains, etc...)
 10 and is solely to alert consumers that the platform or app in question sells what consumers came to
 11 buy. Other wallets and applications, as shown in Plaintiff’s examples (Jain Dec. Exhs. ____), will
 12 need to indicate whether they support TARI® and/or TARO, regardless of blockchain. Otherwise,
 13 it will be rendered useless by consumers.

14 **5. Illustration of Real-World Confusion: BASE Token v. BASE the Second
 15 Layer**

16 Even though Defendant claims it does not intend to create a TARO token, confusion will
 17 still occur. Because one can create a token using the TARO protocol, it will still be denominated a
 18 TARO asset in crypto parlance. (Jain Supp. Exh. ____). Even on its own website, Defendant
 19 acknowledges that confusion and scams are abound. .” (See Jain Dec. Exh. 13).

20 This was precisely the case last week in connection with an announcement by popular
 21 crypto exchange site Coinbase. (Jain Supp. Exh. ____). On February 23, Coinbase announced the
 22 launch of a layer two blockchain network, called Base. Despite Coinbase’s explicit statements that
 23 it had no plans to launch a token in connection with the BASE network, cryptocurrency enthusiasts
 24 bought an unrelated and unaffiliated token named BASE, causing the token’s price temporarily to
 25 rise 250%. (Jain Supp. Exh. ____).

26 **D. The Marks Are Virtually Identical in Sight and Sound**

27 That TARI® and TARO may have different dictionary definitions does not change the fact
 28 that the marks are nearly identical in sight and sound, differing only by one letter. Similarity of

1 either sight, sound or meaning is enough to establish similarity for the purposes of likelihood of
 2 confusion. *See, e.g., Citibank N.A. v. City Bank of San Francisco*, 206 U.S.P.Q. 997 (N.D. Cal.
 3 1980) (CITIBANK and CITY BANK held similar).⁶

4 The obvious visual and phonetic similarity of TARI and TARO is made more problematic
 5 by the fact that the differing letters – I and O – lie next to each other on a standard QWERTY
 6 keyboard. (Jain Supp. Exh. __)(compiling instances where users have mistyped Taro when
 7 meaning to Tari on Tari’s page on the social media platform, Telegram). Where, as here,
 8 consumers and developers will be encountering both parties’ services exclusively online where
 9 keyboard strokes matter, it is trivially easy for an unsuspecting user of the parties’ goods and
 10 services to mistype the name. This occurs often. (Jain Supp. Exh. __). Imagine, for example, a
 11 new credit card company that issues a credit card called VISO. There would be no doubt that the
 12 mark is too similar to the registered mark VISA® for identical services.

13 Nor does it matter that there may be other parties who, according to Defendant, are offering
 14 tokens with names similar to TARI. There is no evidence that a single one of these other token
 15 providers are viable businesses and/or competitive threats to Tari. And, as recent events have
 16 shown, the co-existence of similar names for similar services in the cryptocurrency space has
 17 resulted in confusion. See *infra* __. (Jain Supp. Exh. __). If sophisticated investors in
 18 cryptocurrency companies can be so easily confused, it is easy to imagine the same type of
 19 confusion arising over Tari and TARO.⁷

20 ⁶ *See also Interstate Brands Corp. v. McKee Foods Corp.*, 53 U.S.P.Q. 2d 1910 (T.T.A.B. 2000)
 21 (“Similarity in either form, spelling or sound alone may be sufficient to support a finding of likeli-
 22 hood of confusion;” finding YO-YO’S to be similar to HOHOS based solely on phonetic similar-
 23 ity).

24 ⁷ Defendant’s cited cases do not help their cause. In *Haven Cap. Mgmt., Inc. v. Havens Advisors, L.L.C.*, 965 F. Supp. 528 (S.D.N.Y. 1997), the court acknowledged “obviously [the marks] are sim-
 25 ilar” despite differences in one letter. *Id.* at 531. In *iCall, Inc. v. Tribair, Inc.*, 2012 WL 5878389, (N.D. Cal. Nov. 21, 2012), the Court found dissimilarity between iCall and WiCall on the grounds
 26 that “I” and “Wi” were the dominant parts of the mark, and that “CALL” was merely descriptive.
 27 Here, Tari and TARO are single words, incapable of such division. Finally, in *FieldTurf USA Inc. v. Tencate Thiolon Middle East, LLC*, 945 F. Supp. 2d 1379 (N.D. Ga. 2013), the court found no
 28 likelihood of confusion based on similarity of the trademark owner’s EVOLUTION mark and the
 alleged infringer’s use of REVOLUTION for competing goods, because, in part, the infringer used
 a motto in its marketing materials that “It’s not evolution, it’s REVOLUTION.” This factor favors
 grant of the preliminary injunction.

1 **E. Tari Has Demonstrated Actual Confusion**

2 Tari has also demonstrated actual confusion, which goes above and beyond what is required
 3 to prove trademark infringement. *Stone Creek, Inc. v. Omnia Italian Design, Inc.*, 875 F.3d 426,
 4 433 (9th Cir. 2017) (“Such evidence is not necessary for a finding of likelihood of confusion, but it
 5 bears on the inquiry and is particularly potent”); *Brookfield*, 174 F.3d at 1050 (“because actual
 6 confusion is hard to prove; difficulties in gathering evidence of actual confusion make its absence
 7 generally unnoteworthy”). As discussed above, as early as June 2022, Tari identified and disclosed
 8 to Defendant evidence that social media users were being confused by the “TARO” mark.
 9 Additional evidence has since come to light, including an internet article purporting to describe the
 10 TARO protocol that includes an erroneous reference to TARI® as being affiliated with TARO.
 11 (Palmatier Reply Decl. ¶ 16.) While such proof of actual confusion is not required at this stage, it
 12 provides strong evidence that further consumer confusion is likely.

13 Defendant seeks to downplay evidence that Defendant’s own counsel confused “TARI” and
 14 “TARO” in response to Tari’s cease-and-desist letter. (Opp. at 19-20.) Defendant claims that this
 15 was not consumer confusion or reflected a mistake by counsel. (*Id.*) However, courts in this Circuit
 16 recognize that “non-consumer confusion can serve as a proxy for consumer confusion” because
 17 “confusion on the part of a sophisticated nonconsumer may reasonably signal that less
 18 sophisticated consumers would also be confused.” *Rearden LLC v. Rearden Com., Inc.*, 683 F.3d
 19 1190, 1215 (9th Cir. 2012). A trademark lawyer working on an infringement dispute can be
 20 expected to be exceptionally careful and discriminating with respect to differences between the
 21 disputed marks. The fact that Defendant’s own counsel was confused by the similarity between
 22 TARI® and TARO is strong evidence that consumers – who are not expected to exercise such a
 23 heightened degree of care – will certainly be confused. *See Rearden*, 683 F.3d at 1215 (crediting
 24 confusion among party’s “patent attorneys” as “evidence of actual confusion on the part of other
 25 non-consumers” that served as “proxy” for consumer confusion); *TrafficSchool.com, Inc. v.*
 26 *Edriver Inc.*, 653 F.3d 820, 828 (9th Cir. 2011) (crediting evidence that “a private law firm in
 27 Texas [...] mistakenly linked their websites to [defendant’s website]” as actual confusion in
 28 Lanham Act false advertising case).

1 Tari has also proven actual confusion through the scientific survey conducted by Dr.
 2 Palmatier. Defendant does not dispute that net confusion of 35.3% far exceeds the threshold at
 3 which courts have awarded preliminary injunctive relief. (Mot. at 17.) Defendant levels various
 4 technical criticisms at Dr. Palmatier's survey design, but none has merit. As explained in detail in
 5 Dr. Palmatier's Preliminary Expert Report and his Reply Declaration that accompanies this brief,
 6 his survey (i) appropriately used survey images based on the parties' actual presentation of their
 7 marks in the marketplace⁸ (ii) appropriately used a *Squirt* design to reflect the degree of
 8 marketplace proximity between TARI® and TARO, including based on Defendant's own
 9 marketing channels and descriptions of its intended customers (iii) appropriately used non-leading
 10 prompts in the survey questionnaire, (iv) used appropriate survey controls, rather than the biased
 11 alternatives suggested by Defendant, and (v) surveyed an appropriate set of potential consumers,
 12 unlike Defendant's artificially narrow proposed subset.⁹

13 Grasping at straws, Defendant also argues that confusion is not likely because the TARI®
 14 and TARO protocols have "coexisted" without consumer confusion. (Opp. at 35.) This is mistaken
 15 because Tari identified examples of confusion as detailed above. And the argument lacks merit
 16 because the TARO product is still in its pre-launch phase, so widespread confusion would not yet
 17 be expected. In all of the cases cited by Defendant, products had been launched in the market and
 18 coexisted on a large scale for a significant time with no confusion.¹⁰ There is nothing remotely

19
 20 ⁸ Defendant's cases dealing with "notecard" type surveys (Opp. at 16) are all distinguishable be-
 21 cause they presented marks in plain text – a far cry from Dr. Palmatier's survey design, which
 22 faithfully captured the marks as they are actually used by Plaintiff and Defendant on their respec-
 23 tive internet marketing materials.

24 ⁹ Defendant's assertion that other courts have "rejected" Dr. Palmatier's surveys is false. (Opp. at
 25 16.) In the *Stone Brewing* case, Dr. Palmatier's survey testimony was admitted at trial, not "re-
 26 jected." *Stone Brewing Co., LLC v. MillerCoors LLC*, 18-CV-331, 2022 WL 4596570, at *1 (S.D.
 27 Cal. Aug. 4, 2022). And in the *Waterloo* case, the court expressly declined to address the opposing
 28 party's criticisms of Dr. Palmatier's survey because the motion was resolved on other grounds. *Wa-
 terloo Sparkling Water Corp. v. Treaty Oak Brewing & Distilling Co., LLC*, 21-CV-161, 2021 WL
 5568159, at *9 (W.D. Tex. Nov. 28, 2021). In neither of these cases was Dr. Palmatier's testimony
 "rejected" as Defendant claims.

29 ¹⁰ *Equinox Hotel Mgmt., Inc. v. Equinox Holdings, Inc.*, No. 17-CV-06393-YGR, 2018 WL
 30 659105, at *8 (N.D. Cal. Feb. 1, 2018) (2.5 years in market with no confusion); *Matrix Motor Co.*
 31 *Inc. v. Toyota Jidosha Kabushiki Kaisha*, 290 F. Supp. 2d 1083, 1093 (C.D. Cal. 2003) (nationwide
 32 car sales for more than a year without significant confusion);

1 comparable here. Instead, Tari brought this motion for preliminary relief precisely to *prevent* such
2 confusion from occurring in the first place. Because there is strong direct and circumstantial
3 evidence of actual confusion even at this early stage, this factor strongly favors a temporary
4 restraining order and preliminary injunction.

5 **CONCLUSION**

6 For the foregoing reasons, Tari's requested Preliminary Injunction should be granted.
7
8

9 Dated: March 2, 2023

Respectfully submitted,

10 BRAUNHAGEY & BORDEN LLP

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12 J. Noah Hagey

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14 *Tari Labs, LLC*

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